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No. 02-566

IN THE

Supreme Court of the United States

CAROL HARLEY, *et al.*,
Petitioners,

v.

3M COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

JOHN D. FRENCH
STEVEN L. SEVERSON
DEBORAH A. ELLINGBOE

FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

JOHN G. KESTER *
J. ALAN GALBRAITH

WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Respondents

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Were participants in a "robust, richly-funded" defined-benefit pension plan that had a substantial surplus nevertheless authorized under ERISA 29 U.S.C. § 1132 to sue to obtain additional surplus, following an investment loss that had no effect on the adequacy of the plan's funding to pay benefits, and that the defendant employer already had voluntarily restored by excess contributions?

2. Did the Court of Appeals properly affirm unanimously the District Court's factual finding that a particular fee paid to an investment adviser of an ERISA plan, when there was no claim of intentional misconduct, was not unreasonable, and therefore was not actionable under ERISA?

LIST OF PARTIES

Respondent 3M Company is a publicly-held corporation. It has no parent companies, and no publicly-held corporation owns 10% or more of its common stock. Other parties are stated in the petition.

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BRIEF IN OPPOSITION

STATEMENT

The petition covers two lawsuits, which were decided separately in the District Court, but in a single opinion by the Court of Appeals.

1. The first case was a class action brought in 1996 against 3M Company[1] in the United States District Court for the District of Minnesota. The three plaintiffs, petitioners here, were participants in the 3M Employee Retirement Income Plan, a defined-benefit pension plan for 3M employees, of which 3M was the sponsor and sole contributor. Petitioners alleged that because of an imprudent investment, 3M had

[1] 3M Company at that time was called Minnesota Mining and Manufacturing Company.

violated the federal ERISA statute by failing to discharge its fiduciary duty "with the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use . . . ." 29 U.S.C. § 1104(a)(1)(B).

That alleged violation was based on an investment in 1990 of $20 million—out of the Plan's then assets of $2.3 billion—in a hedge fund called Granite Corporation, which held a portfolio of mortgage-related derivative securities. The value of the Plan's investment in Granite climbed to $34 million in February 1994; but in April 1994, because of an unforeseen interest-rate rise, Granite became insolvent and bankrupt, and the Plan's investment consequently worthless. Granite's manager admitted to having improperly valued and structured the portfolio. A. 3a. Petitioners alleged that 3M had failed adequately to investigate and monitor the Granite investment.[2]

In September 1994, five months after the failure of Granite, 3M contributed to the Plan $101 million in excess of the amount required by the federal ERISA law. Voluntary overpayments to the Plan, which had been made in previous years, continued thereafter. From 1993 to 1998, 3M contributed to the Plan a total of $683 million in excess of legal requirements.[3] At all relevant times, the 3M Plan was in an "overfunded" condition, with the surplus funding rising from

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[2] The petition in its "Statement of the Facts" states, Pet. 3, that as of 1998 "the cumulative investment loss to the Plan was approximately $80 million," citing the District Court opinion at P.C.A. 48a. That opinion made no such finding; it simply recited what petitioners were arguing. *Id.* Respondents wholly disagree with that number, which far overstates the real loss.

[3] In addition, besides making the $101 million voluntary overpayment, the Plan fiduciaries also brought suit on the Plan's behalf against investment advisors and broker-dealers associated with the Granite investment. See P.C.A. 3a n.4; *ABF Capital Mgt.* v. *Askin Capital Mgt., L.P.*, 957 F. Supp. 1308 (S.D.N.Y. 1997).

$430 million in 1994 to $1.4 billion in 1999. The total assets of the Plan rose to $3.4 billion in 1995 and $6.3 billion in 1999.

On March 29, 2000, having earlier referred to "the unique circumstances of this case," P.C.A. 69a, the District Court granted summary judgment for 3M on the claim for allegedly imprudent investment. Citing this Court's decision in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999), the court explained that because this was a defined-benefit plan, the rights of plan participants were to specified benefits, and did not include any interest in the size of the surplus. There was no evidence whatsoever that the ability of the Plan to pay had been affected or jeopardized by the loss in the Granite investment, because the Plan at all times had a very substantial surplus resulting in part from very large voluntary extra payments by 3M. P.C.A. 37a.

With respect to the claim of unauthorized compensation of the investment adviser, the District Court noted that petitioners had never brought it as a formal claim, and had then abandoned reliance on one statutory provision and substituted another. P.C.A. 63a. Even if the issue had been properly before it, the court held, the compensation arrangement of the Granite adviser on the facts presented clearly came within the provision of 29 U.S.C. § 1108(c)(2) that specifically authorizes "any reasonable compensation for services rendered." P.C.A. 64a-65a.

2. After 3M filed its motion for summary judgment, petitioners on September 29, 1999 brought a second class-action complaint in the same court. This one named as defendants the seven individual members of 3M's Pension Assets Committee, to whom 3M delegated management of Plan investments. The substance of the allegations was

identical to petitioners' suit against 3M.[4] On December 7, 2000, the District Court granted summary judgment for the defendants in this second suit, based on collateral estoppel from the first ruling. The court did not have occasion to consider numerous other defenses the defendants in the second case had raised, including the statute of limitations, and a stipulation by petitioners not to sue. Addendum at 4a, *infra*.[5]

3. The Court of Appeals held that in the unusual circumstances of this case, because of the large overfunding payments voluntarily contributed by 3M, which far exceeded the investment loss complained of, the "ongoing plan had a substantial surplus before and after the alleged breach and a financially sound settlor responsible for making up any future underfunding," so that all participants' pension rights were "fully protected." P.C.A. 10a. Dismissal was proper when "the Plan's surplus was sufficiently large that the Granite investment loss did not cause actual injury to plaintiffs' interests in the Plan." P.C.A. 11a. The court observed that "the purposes underlying ERISA's imposition of strict fiduciary duties are not furthered" by such a lawsuit, P.C.A. 10a, and that "[i]n these circumstances, the failure to investigate and monitor claims were properly dismissed because plaintiffs suffered no injury-in-fact." P.C.A. 12a. The Court of Appeals also affirmed the District Court's holding that there was no prohibited transaction with the investment adviser, because there was no evidence that the fee paid was unreasonable, and therefore it was authorized under 29 U.S.C. § 1108(c)(2).

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[4] See Addendum at 4a, *infra*. This complaint added a claim of violation of ERISA 29 U.S.C. § 1106(b)(1), by allegedly permitting an unreasonable fee to the investment manager.

[5] The District Court's December 7, 2000, opinion, which is not reproduced in the Petition for Certiorari, is appended hereto.

Judge Bye, writing separately, agreed as to the latter point, but believed contrary to the majority that petitioners were authorized by 29 U.S.C. § 1132(a)(2) of ERISA to bring claims on behalf of the Plan for breach of fiduciary duty. He reasoned that petitioners were "statutorily designated" agents of the Plan and permitted to sue based on what he believed this Court had "suggested" in *Vermont Agency* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000), in which a *qui tam* relator was held to have standing to sue because of assignment to him of part of the claim. P.C.A. 16a. In his brief opinion, Judge Bye did not discuss requirements of injury, redressability, nor the effect of the large overpayments made by 3M, which far exceeded any loss. P.C.A. 16a-17a.

REASONS FOR DENYING THE WRIT

I. THIS CASE INVOLVES UNUSUAL FACTS AND LACKS GENERAL SIGNIFICANCE.

The holding in this case is especially narrow. It applies only to the small minority of pension plans that are defined-benefit; [6] and of those, only to those that are overfunded; and of those, only to claims for imprudent investment. Claims for breach of duty of loyalty or for intentional misconduct are not addressed at all. Finally, it concerns only this tiny category of claims in the context of an action brought by plan participants and beneficiaries. The statutory authority of fiduciaries or the Secretary of Labor to bring suit is entirely unaffected. See P.C.A. 12a n.5.

Petitioners are quite mistaken to suggest that the present decision broadly "precludes participant enforcement of fiduciary standards," and thereby conflicts "with decisions by

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[6] Once the norm, defined-benefit pension plans now comprise only 8% of retirement plans subject to ERISA in the United States. Joint Committee on Taxation, *Background Information Relating to the Investment of Retirement Plan Assets in Employer Stock* 14 (2002). And only a fraction of that 8% of plans is overfunded.

every other court that has considered the standing of participants to enforce fiduciary standards in connection with defined benefit pension plans." Pet. 13. The Court of Appeals confined its holding to participants in these circumstances who "seek relief under § 1109 for *this particular breach of duty*, given *the unique features of a defined benefit plan*," P.C.A. 7a (emphasis supplied)—*i.e.*, a duty to exercise care to avoid imprudent investments. The holding has nothing to do with, for instance, a claim that a fiduciary had a conflict of interest. It has nothing to do with complaints for breach of the fiduciary duty of loyalty. No case is cited by petitioners, and none has been found, which addresses a suit by participants to challenge allegedly imprudent investments in this very narrow situation, where the plan at issue has a substantial surplus, and where no fiduciary was ever accused of self-enrichment.

No damage to any Plan participant was at issue. Petitioners failed to come forward with a shred of evidence that the investment complained of had the remotest effect on the stability of the Plan, or its ability to pay all benefits in the future. The Plan, as was previously noted, was overfunded by hundreds of millions of dollars in excess of legal requirements. The Plan was found by the District Court, and the Court of Appeals expressly agreed, "[b]y nearly any measure" to be "a robust, richly-funded, ongoing plan," P.C.A. 12a, 37a, with assets exceeding $6.3 billion, P.C.A. 4a.

> "The actuarial value of the Plan's assets exceeded its actuarial accrued liabilities in 1993, before Granite's bankruptcy, and in every year thereafter. 3M has contributed $683 million more than its minimum funding requirements since the loss of the $20 million Granite investment. Plaintiffs failed to prove the absence of a substantial surplus under any relevant valuation method. In these circumstances, the failure to

> investigate and monitor claims were properly dismissed because plaintiffs suffered no injury-in-fact."

P.C.A. 12a (footnote omitted). Indeed, in the 71 years since its establishment in 1931, the Plan has never failed to make any payment owed to any participant. *Cf.* P.C.A. 33a.

The complaint accused 3M of having made a bad investment of $20 million. Yet it is undisputed that 3M more than restored the loss on that investment by then voluntarily contributing to the Plan an additional $683 million not required by law. So all that is really at stake in this litigation is a hope of recovering class-action attorneys' fees, which would be associated with a court order that 3M had incurred an obligation to reimburse to the Plan for loss on the Granite investment—even though 3M long ago voluntarily made excess contributions to the Plan several times that amount. As the Court of Appeals pointed out, "[i]ndeed those rights [of individual participants] would if anything be *adversely* affected by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury from a relatively modest but allegedly imprudent investment." A. 10a (emphasis supplied).

Attorneys' hopes for class-action fees are not a sufficient basis for maintaining litigation or distorting the ERISA statute, much less a reason for this Court to grant certiorari. This Court has explained more than once that "courts should use caution to avoid carrying forward a moot case solely to vindicate a plaintiff's interest in recovering attorneys' fees." *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 192 n.5 (2000). An "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim . . . ." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990), quoted in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). See also *Diamond* v. *Charles*, 476 U.S. 54, 70-71 (1986).

Nor is any substantial enforcement concern at issue. The Secretary of Labor plainly is authorized by statute to bring suit for ERISA violations in 29 U.S.C. § 1132(a)(2), as an enforcement function without the restrictions applied to private parties. Hence, if rare situations like the present one were to arise, and the Department of Labor believed the conduct of a fiduciary sufficiently serious or troubling, the Secretary could elect to bring suit. Petitioners observe that "the Secretary's enforcement resources are limited." Pet. 19. But all government resources are limited, not least of all this Court's. How they are allocated for various enforcement ends is a matter decided by Congress and the Executive Branch officials assigned to make those policy decisions. There is no evidence that Congress in ERISA prescribed a proliferation of suits by undamaged participants, to recover monies already reimbursed, addressed to alleged violations of prudence that federal administrators deemed unworthy of their own action. If the Secretary of Labor truly believed that the anomalous facts of this case were important enough to warrant an enforcement action, she could have chosen to bring suit. She did not do so. A relatively small case of an unfortunate investment, insufficiently significant to engage the enforcement staff of the Department of Labor, scarcely seems an appropriate candidate for the limited time of this Court.

Nor need this Court assume the responsibility to address minor or anomalous disagreements of construction occurring in unusual situations like this one concerning the ERISA statute. Congress is the primary body to address statutory issues if they seem important or recurrent enough, and it exercises its legislative oversight over ERISA. ERISA is one of the most frequently and constantly amended statutes ever enacted. It was significantly amended in 1980, 1984, 1986, 1991, 1994 and 1997. See references collected at 29 U.S. Code Ann. at § 1001. In 1994 it was observed that as of then "Since 1974, ERISA has grown from 200 pages of legislation

and legislative history to 700 pages of legislation, 3600 pages of regulations, and countless pages of cases and commentary." Sirkin, *The 20 Year History of ERISA*, 68 ST. JOHN'S L. REV. 321, 321-22 (1994).

II. THE DECISION OF THE COURT OF APPEALS CONFORMS TO THIS COURT'S DECISIONS.

As this Court explained in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999), a defined-benefit plan—unlike the far more common defined-contribution plans (such as § 401(k) plans), in which an employee's interest is to a share of the fluctuating value of a fund's investments—promises a predetermined retirement obligation, which does not vary according to the success of the Plan's investments. If a defined-benefit plan is overfunded, "the employer may reduce or suspend his contributions." 525 U.S. at 440. See also *Bennett* v. *Conrail Matched Sav. Plan Admin. Comm.*, 168 F.3d 671, 677 (3d Cir.)(participants in employee stock ownership plan may not bring breach-of-fiduciary-duty claims because they are not entitled to surplus assets), *cert. denied*, 528 U.S. 871 (1999).

This Court in *Hughes Aircraft* emphasized that "it is essential to recognize the difference between defined contribution plans and defined benefit plans," for in the latter, because the benefit is predetermined, "the employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan's investments." 525 U.S. at 439.

If the assets of a defined-benefit plan are greater than the amount of the accrued benefit obligation, calculated on an actuarial basis, the plan possesses a surplus. Participants in a defined-benefit plan "have no entitlement to share in a plan's surplus." *Hughes*, 525 U.S. at 440. The employer may, among other things, cease making contributions to the plan until the surplus has been exhausted, *id.* at 440, or add

benefits for a new class of participants. *Id.* at 442. Existing participants, in short, have no expectation that a surplus will persist or be used for their benefit. In the present case, no shortfall in funding ever occurred; the Plan was at all relevant times comfortably in surplus. And even the relatively small loss from the Granite investment was more than made up by voluntary additional contributions by 3M that exceeded the required amount.[7]

A. The Decision Correctly Interprets ERISA in Light of This Court's Holdings.

As the Court of Appeals' opinion pointed out, the decision here is based on interpretation of the ERISA statute, not on Article III of the Constitution. See P.C.A. 8a. The decision reflects that petitioners ultimately could show no injury for which ERISA provided a claim. The remedy prescribed by ERISA for violation of the "prudent man" standard is "to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). That is exactly what already occurred here. The overpayments by 3M to the Plan are the equivalent—and indeed far exceed—the very payments petitioners' complaint, if successful, would have required. The statute does not "authorize any relief except for

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[7] The petition now adds a new assertion—with no support in the record—that currently "the Plan is underfunded." Pet. 24. But the relevant period, on which the record was made and the case was addressed by the District Court and Court of Appeals, was 1994-1999. See P.C.A. 38a n.6. Moreover, petitioners' new assertion, made for the first time in this Court, is quite incorrect. The Plan has continued to be overfunded by the measures applied by the courts below, as reflected in its most recent required annual ERISA reports on Form 5500. *Cf.* P.C.A. 25a. Unlike the valuation method used in the SEC filing petitioners rely upon (FAS 87), these annual reports reflect the surplus funding of the Plan using valuation methods required by ERISA (AAL and RPA '94). See P.C.A. 12a, 27a, 29a, 30a. Indeed, petitioners themselves did not propose the FAS 87 method in either the District Court or the Court of Appeals, and neither court addressed it.

the plan itself." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 144 (1985). To the extent the complaint sought to make the Plan whole, the Plan already had been made whole. After being made whole, the Plan had no damage. *Cf. Call* v. *Sumitomo Bank*, 881 F.2d 626, 628 n.4, 632-33 (9th Cir. 1989); *Katsaros* v. *Cody*, 744 F.2d 270, 280-81 (2d Cir.), *cert. denied sub nom. Cody* v. *Donovan*, 469 U.S. 1072 (1984).[8]

Even if the test were simply that of Article III, which the Court of Appeals found unnecessary to decide, it would not be met by petitioners on the particular circumstances of this case. Because of the overpayments, petitioners simply have suffered no injury, a basic requirement of standing under Article III. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). Further, another essential for Article III standing is "redressability"—"a likelihood that the requested relief will redress the alleged injury." *Id.*; see also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here redressability is absent, because the overpayments by 3M left nothing to redress. In another sense, because of the overpayment, the issue is simply moot. *Cf. North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974).[9]

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[8] Although the complaints included a routine request for injunctive and other appropriate relief, petitioners did not specify particular relief or challenge its denial in the District Court, and neither that court's opinion nor the opinion of the Court of Appeals addressed it. Even if it had been adequately pleaded and preserved, the only conceivable injunction plaintiffs could have sought would be an order directing 3M and the other respondents to obey ERISA. But ERISA itself already contains such a command, and a generalized injunction would be not only redundant but contrary to Fed. R. Civ. P. 65(d) and the principles of equity. See *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters*, 415 U.S. 423, 444 (1974).

[9] *Vermont Agency* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), involved a markedly different statute that actually assigned part of the claim to the plaintiffs. Petitioners had no statutory basis to assert such

Because the money the complaint sought (from 3M) would go to the Plan—and thereby *pro tanto* reduce the obligation of 3M to fund the Plan—the suit in substance seeks to impose on 3M a judgment to pay money for the benefit of 3M, less the portion that would be captured by attorneys' fees. Petitioners argue that ERISA should allow them to sue on behalf of the Plan. But the Plan obtains no benefit whether the suit is won or lost. Certainly neither the ERISA statute nor the limits of standing should be distorted or stretched to encompass recoveries by attorneys for phantom services. It is "purely speculative" whether obtaining such relief would achieve any benefit at all. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976); *cf.* also, *e.g.*, *DeFunis*, *supra*; *Hall* v. *Beals*, 396 U.S. 45, 49 (1969). And "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Steel Co.*, 523 U.S. at 107. "[W]e are obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001).

B. The Decision Is Clearly in Accordance With the Trust Principles Upon Which ERISA Is Based.

ERISA's provisions "are guided by principles of trust law." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989); see also *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996). "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility." *Central States, SE & SW Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985). This

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a claim here. *United Food & Comm'l Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544 (1996), addressed only the situation in which an association seeks to represent its members, exactly the opposite of the situation here.

Court looks to trust law in interpreting the scope of ERISA's remedial provisions for breach of fiduciary duty. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255-59 (1993).

Under the common law of trusts, beneficiaries whose interest in a trust are not injured after an allegedly imprudent investment of trust assets do not have standing to bring an action for fiduciary breach. RESTATEMENT (SECOND) OF TRUSTS, § 214, Comment *b* (1959)("A particular beneficiary cannot maintain a suit for breach of trust which does not involve any violation of duty to him."); A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 214 (4th ed. 1988) ("In order to maintain a suit . . . the beneficiary must show that his interest is involved"). Thus, for example, "[a] remainderman cannot sue for breach of an investment duty resulting merely in a loss of income." G. BOGERT & G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 871 (2d ed. rev. 1982). "[W]here a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991), quoting in part *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952).

Petitioners' claim of imprudent investment clearly would fail under trust law. As this Court held in *Hughes*, petitioners as participants in a defined-benefit plan "have no entitlement to share in [the] plan's surplus." 525 U.S. at 440. The breach petitioners allege did not affect their interest in receiving their defined benefits, and it did not reduce assets to which they were entitled. Consequently, petitioners are not, under trust law, the appropriate parties to bring suit in these cases.

Moreover, the text and structure of ERISA 29 U.S.C. § 1132(a)(2) confirm the expectation that the classes of actions authorized there would be shaped by existing principles of law. That section authorizes only suits for "appropriate relief," *id.*, thus leaving for the courts, applying

existing principles and doctrines of trust law, to identify the persons situated to seek relief in the circumstances of a particular case. *Cf. FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 486-87 (1985)(statutory authorization of actions "appropriate to implement" act precludes standing for private parties when FEC was the more appropriate party to bring suit). And the principles and doctrines of trust law arise entirely from the doctrines of equity, under which such a complaint clearly fails.

C. Petitioners' Interpretation Would Undermine the Purposes of ERISA.

ERISA's requirements of adequate funding are designed to ensure that when workers retire, money will be on hand to pay the benefits they are owed. *Nachman Corp.* v. *Pension Ben. Guar. Corp.*, 446 U.S. 359, 375-76 (1980). To hold employers liable for unsuccessful investment decisions, as petitioners seek, even when employers have generously overfunded the plan, and made extra payments more than sufficient to offset a loss, would create a perverse incentive. Instead of encouraging overfunding, it would motivate employers to hold back, and limit funding to the minimum required by law, reserving other amounts for potential judgments for fiduciary breach. Further, an employer like 3M, which already has funded the plan far beyond legal requirements, might be encouraged instead simply to cease payments for a year or two, until a judgment amount (plus interest and attorneys' fees) had been paid. In the end, contrary to the goals of ERISA, retirement plans would receive less, rather than more, funding. The overall effect would be to impose on employers—and, ultimately, the plans—the transaction costs of wholly unnecessary fiduciary litigation, and ultimately to divert money away from ERISA plans to attorneys.

ERISA was intended to assure adequate funding of pension benefits, not to be a litigation-generator. It reflects Congress' "desire not to create a system that is so complex that

administrative costs, or litigation expenses, unduly discourage employers from offering . . . benefit plans in the first place." *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). See also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987) (to allow punitive damages under ERISA would be "contrary to the public interest in encouraging the formation of employee benefit plans"); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981).

III. THERE IS NO CIRCUIT CONFLICT.

The conflict supposed by petitioners completely ignores the unusual facts of this case, on which the decision of the Court of Appeals entirely depended. There is no reported case that respondents have been able to discover with circumstances even close to the present one. None of the three decisions cited by petitioners—nor any others, to respondents' knowledge—had any occasion to consider the unusual situation of a defined-benefit pension plan that was overfunded, partly as a result of a stream of voluntary overpayments by the employer. And all of them concerned intentional breaches of the fiduciary duty of loyalty—not, as here, a single small, allegedly imprudent, investment that involved no conscious wrongdoing.

The contrast between the present case and the three cases cited by petitioners, which involved vastly different facts and claims, is striking. None of those cases involved a claim, like the present one, of negligent breach of the prudent-man duty. All involved breaches—intentional breaches—of the fiduciary's duty of loyalty. All those cases, moreover, were decided substantially prior to, and hence without the benefit of, this Court's decision in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999). In *Hughes* this Court focused sharply on the unique nature of defined-benefit plans. This Court pointed out that "the employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as a result of a

shortfall that may occur from the plan's investments." 525 U.S. at 439. And this Court emphasized that in the uncommon realm of defined-benefit plans, participants simply have no entitlement to or interest in a plan's surplus assets. *Id.* at 440-41.

Brink v. *DaLesio*, 667 F.2d 420 (4th Cir. 1981), involved a gross breach of duty of loyalty, in which a plan fiduciary had diverted part of the employer's plan contributions to the plan as a "consultant's fee," and in addition had "secretly received a commission from the insurers who sold coverage to the funds, and agreed to represent their interests in an adversarial capacity." 667 F.2d at 426. The court held that suit was appropriate on behalf of the plan to recover amounts improperly taken from it. Insofar as the court addressed standing, it was simply the issue whether participants could intervene after the suit already had been brought, an issue of no relevance here.

In *Amalgamated Clothing & Textile Workers Union* v. *Murdock*, 861 F.2d 1406 (9th Cir. 1988), the breach-of-loyalty claim was that a fiduciary had used plan assets to drive up the price of stock he owned, then amended the plan to distribute assets to himself, and then terminated the plan. The relief the court of appeals ordered was not money damages, but rather imposition of a constructive trust of the dishonest fiduciary's gains. In declaring the fiduciary's profits to be held in constructive trust for the benefit of the plan, the court found it "the only means available to give effect to the goals of ERISA," 861 F.2d at 1411, and rejected the intentional wrongdoer's "claim that ERISA provides no remedy to deny the fiduciary these alleged ill-gotten profits," *id.* at 1415. The reason for imposing a constructive trust, the court emphasized, had nothing to do with whether there was any loss to the Plan. Rather, it was an equitable remedy to prevent an intentional wrongdoer from profiting from his wrongdoing, a remedy designed to deter intentional wrong-

doing by fiduciaries. *Id.* at 1411-12. In the present case, by contrast, there is no claim of intentional wrongdoing, nor that any fiduciary pocketed any assets belonging to the Plan.

Financial Institutions Retirement Fund v. *OTS*, 964 F.2d 142 (2d Cir. 1992), alleged a "conflict of interest," *id.* at 149, on the part of plan fiduciaries, pursuant to which they had made an improper distribution of surplus assets, as a result of improper influence. Fiduciaries are not likely to sue themselves for their own improper self-dealing; hence the participants were allowed to do so on behalf of the plan. The present case, of course, involves no claims of self-dealing at all. In any event, the central holding of the decision was that there had been no breach and dismissal was proper on that ground, quite apart from any ERISA standing issue. Moreover, the opinion scarcely mentioned the question whether there was statutory standing under ERISA, focusing instead on whether suit was permitted under Article III. See *id.* at 1309.

Thus none of the three cases cited by petitioners contains a conflict, much less a present one. All are markedly different on their facts from the peculiar situation of the present case, and all were decided well before this Court's decision analyzing defined-benefit plans in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999). In the present case, there were no claims of conflict of interest or improper self-dealing, and no defendant was enriched by the unsuccessful investment.

IV. THE RULING CONCERNING REASONABLENESS OF AN INVESTMENT ADVISER'S COMPENSATION WAS NOT ERRONEOUS AND DOES NOT MERIT THIS COURT'S REVIEW.

Petitioners' complaint against 3M did not even mention any claim that the fee paid to an investment advisor was unreasonable and therefore a "prohibited transaction." Nor

did their amended complaint. Nevertheless, over objection they tried to add such a theory at the summary judgment stage, on the theory that 3M had violated ERISA 29 U.S.C. § 1106(b)(1), by allowing an investment manager a fee based on value of the assets. After full discovery, the District Court granted summary judgment for 3M, holding that even if there had been such a claim in the complaint, on the undisputed material facts petitioners had failed to present any admissible evidence that the fee was not reasonable; on the contrary "there is no evidence in the record to support the claim," P.C.A. 63a, and "this amount [of compensation] was reasonable." P.C.A. 65a. Therefore no actionable violation had occurred. P.C.A. 66a.[10]

On appeal, petitioners argued that the fee provision with the investment adviser violated the prohibition against a fiduciary dealing with plan assets, whether or not the fees paid were reasonable. The Court of Appeals had no difficulty rejecting that argument, based on the plain language of the ERISA statute:

> "Section 1106(b)(1) prohibits a fiduciary from 'dealing with the assets of the plan in his own interest and for his own account.' However, § 1108(c)(2) provides that '*nothing in section 1106 of this title shall be construed to prevent any fiduciary from . . . receiving any reasonable compensation* for services rendered . . . in the performance of his duties with the plan.' 3M introduced uncontradicted expert testimony that the compensation paid to ACM [the investment adviser] was reasonable."

P.C.A. 13a (emphasis supplied). "[T]he plain language of § 1108(c)(2) sensibly insulates the fiduciary from liability

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[10] Petitioners later added such a claim to their subsequent complaint against the Pension Assets Committee members, which the District Court dismissed on other grounds. See Addendum at 6a-7a, *infra*.

if the compensation paid was reasonable." P.C.A. 14a. "Moreover, the legislative history of § 1108 does not support [petitioners'] contention . . . ." *Id.*

All members of the Court of Appeals panel agreed with this conclusion and that the factual ruling of the District Court should be affirmed. P.C.A. 14a, 16a. Petitioners now argue that that ruling is in conflict with *Patelco Credit Union* v. *Sahni*, 262 F.3d 897 (9th Cir. 2001), a case involving improper self-dealing on the part of a fiduciary in violation of ERISA 29 U.S.C. § 1108(e)(2). But the record here, as determined by the District Court and unanimously affirmed by the Court of Appeals, showed only a fee that was reasonable and therefore was allowed by the statute, and no self-dealing. The statute clearly provides that "[n]othing in section 1106 of this title shall be construed to prohibit any fiduciary from . . . receiving any reasonable compensation for services rendered . . . in the performance of his duties with the plan." 29 U.S.C. § 1108(c)(2). The Court of Appeals rejected petitioners' argument that that provision did not really mean what it said. P.C.A. 13a-14a.

Moreover, even if there were a difference in reasoning between the two cases, the issue whether this particular adviser's compensation was reasonable or not—an issue not even pleaded in the principal complaint—is so narrow and fact-specific as to fall far outside the kinds of cases this Court considers for certiorari.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

JOHN D. FRENCH
STEVEN L. SEVERSON
DEBORAH A. ELLINGBOE

FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

JOHN G. KESTER *
J. ALAN GALBRAITH

WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Respondents

* Counsel of Record

November 14, 2002

ADDENDUM

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 99-1481 (JRT/RLE)

CAROL HARLEY, LENORA BANASZEWSKI, MICHAEL PAYTON, and RICHARD ZOESCH,

Plaintiffs,

v.

GUILIO AGOSTINI, MICHAEL J. BARRETT, LARRY E. EATON, HARRY A. HAMMERLY, RICHARD A. LIDSTAD, DWIGHT A. PETERSON, and JOHN J. URSU,

Defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This putative class action is the second case arising out of defendant Minnesota Mining and Manufacturing Co.'s ("3M") alleged failure to invest prudently the assets of the 3M Employee Retirement Plan ("the Plan"). In the first action, plaintiffs sued 3M, bringing claims of breach of fiduciary duty and a prohibited transaction under ERISA, 29 U.S.C. §§ 1001 *et seq*. The Court certified a class, and on March 31, 1999, the Court granted 3M's motion to dismiss or for summary judgment in part and dismissed the prohibited transaction claim. On March 29, 2000, the Court granted 3M's motion for summary judgment on the breach of fiduciary duty claim and entered final judgment. Meanwhile, on September 29, 1999, plaintiffs filed this action, which is substantially similar to the first with the notable exception that defendants in this action are the individual members of 3M's Pension Assets Committee ("PAC"), the body to which 3M delegated its fiduciary responsibilities for overseeing the

investment of the Plan assets. This matter is now before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment. For the reasons set forth below, defendants' motion is granted.

BACKGROUND

The facts underlying this action are fully set forth in the Court's March 31, 1999 Order entered in the previous case, *see Harley v. Minnesota Mining and Mfg. Co.*, 42 F.Supp.2d 898, 900-04 (D. Minn. 1999), and the Court will only briefly summarize them here. The Plan is a non-contributory defined benefit plan subject to ERISA. 3M is a fiduciary of the Plan and delegated this responsibility to the PAC. In 1990, the PAC decided to invest $20 million of Plan assets in Granite Corporation ("Granite"), a recently created vehicle for investment in primarily mortgage-related derivatives. The PAC agreed to have the Granite managers appointed as the investment managers for the Plan. To compensate the investment managers, the Plan would pay performance-based incentive fees equal to 15% of any increase in the value of the Granite portfolio in excess of the London Interbank Offered Rate ("LIBOR"). In 1994, after a sudden rise in interest rates, Granite's derivative holdings plummeted in value and Granite was drained of all its assets, including the Plan investment and income.

In the previous action, as here, plaintiffs alleged that 3M breached its fiduciary duties under ERISA by failing to investigate, monitor, and understand all aspect of the Granite investment. In its first motion for summary judgment, 3M contended that because it made voluntary contributions to the Plan in excess of plan funding requirements, the class could not establish an essential element of this claim, namely, a loss to the Plan. After oral argument on that motion but prior to the Court's decision, the Supreme Court decided *Hughes Aircraft v. Jacobson*, 525 U.S. 432 (1999). In *Hughes*

Aircraft, the employer used surplus plan assets to fund newly created early retirement and non-contributory benefit structures. *See id.* at 436. Among other claims, the plaintiffs contended that this use of the surplus violated ERISA's vested benefits and anti-inurement provisions. *See id.* at 439. The Court concluded that because participants in a defined benefit plan have no claim to surplus funds, those claims must fail. *See id.* at 441-43.

This Court found the *Hughes Aircraft* analysis instructive and held that *Hughes Aircraft* controlled the class's breach of fiduciary duty claim. *See Harley*, 42 F.Supp.2d at 913. Thus, the Court found that if 3M could show that the Plan had a surplus, the Granite investment caused no loss to the Plan and the class could not prevail. *See id.* at 914. Although the Court denied 3M's motion for summary judgment on that claim at that time due to the incomplete state of the record, the Court ultimately found, on the basis of the parties' later submissions, that the Plan was fully funded. Accordingly, the Court granted 3M's motion for summary judgment and dismissed the action.

ANALYSIS

A. Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court is required to view the facts in a light most favorable to the nonmoving party. *See Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-

moving party. *See Anderson*, 477 U.S. at 248. The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. The General Standard of Care Claim

Plaintiffs claim that defendants' alleged failure to investigate and monitor the Granite investment and failure to acquire suffcient knowledge regarding Granite and its investments constitute a breach of their fiduciary duties under 29 U.S.C. § 1104(a)(1)(A) and (B). Other than the identity of the defendants, the allegations in plaintiffs' complaint respecting this claim are taken nearly verbatim from the amended complaint in the previous action. Defendants move to dismiss or alternatively for summary judgment on a number of grounds, including res judicata, collateral estoppel, plaintiffs' alleged stipulation not to sue the PAC members, claim splitting, and ERISA's statute of limitations, 29 U.S.C. § 1113. The Court need not address all these arguments, because it finds that plaintiffs' claim is barred by the doctrine of collateral estoppel.

Under the doctrine of collateral estoppel, relitigation of an issue is precluded if the following elements are present: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. *See United States v. Gurley*, 43 F.3d 1188, 1198 (8th Cir. 1994).

Plaintiffs maintain that the first and fourth elements are not met in this case. The source of plaintiffs' argument is footnote 23 in the Court's March 31, 1999 Order, in which the Court stated:

> The Court notes that while the *Hughes Aircraft* analysis controls in this case, its applicability to other contexts is

> limited. For example, nothing in *Hughes Aircraft* precludes recovery of defined benefit plan assests or profits that have been wrongfully retained by others. Also, because the analysis in *Hughes Aircraft* depends on the relationship between participants in a defined benefit plan and the employer-sponsor that makes contributions to the plan, it appears to apply only to fiduciaries that are employers.

Harley, 42 F.Supp.2d at 914 n.23. Plaintiffs argue that because defendants in this case are the members of the PAC, and not the employer, footnote 23 indicates that their liability is different and the issues in the two cases are thus not identical.

It is true that the Court, in the previous case, did not need to decide the precise boundaries between employer and non-employer liability under *Hughes Aircraft.* In that sense, plaintiffs have a colorable argument that the issues in this case are not identical to the issues in the previous case. But, just as the Court did not decide this issue previously, it need not do so now. The Court's observation in footnote 23 was not intended to hold out the possibility of liability on the part of the PAC in a case such as this, where the PAC consists of the corporate employer-sponsor's employees, it is undisputed that the PAC's role was to fulfill the employer's fiduciary responsibilities, there is no allegation or suggestion that the PAC members were acting outside the scope of their authority, and it is clear that the corporation itself would ultimately bear any liability imposed on the members of the PAC. *See* 3M Company Bylaws, at 5 (requiring 3M to indemnify its employees in any action "by reason of the fact that such person . . . is or was a Director, officer, or employee of [3M] or serves or served at the request of [3M] any other enterprise as a Director, officer, or employee") (attached as ex. 8 to aff. of Ahna M. Thoresen). The Court was merely noting in dicta that there may be cases in which the

relationship between the fiduciary and the participants in the plan is such that the *Hughes Aircraft* analysis would be inapplicable. For example, cases where a plan is managed by outside, independent advisers, or where the employees to whom the employer delegated its fiduciary responsibilities acted outside the scope of their authority, may present exceptions to *Hughes Aircraft*. Under the undisputed facts presented in this case, however, the PAC's liability is identical to that of the employer for the purpose of establishing the required element of a loss to the Plan. As such, there is an issue in this case identical to the one previously litigated, namely, whether the Plan has a surplus as defined in ERISA and *Hughes Aircraft*. Plaintiffs cannot prevail in this case without a favorable finding on this issue, but the Court previously decided this issue against plaintiffs after they had a full and fair opportunity to litigate it. The Court therefore concludes that collateral estoppel bars their new claim of breach.

C. The Prohibited Transaction Claim

Plaintiffs claim that by agreeing to the performance-based incentive fee, defendants enabled a prohibited transaction in violation of ERISA, 29 U.S.C. § 1106(a), and thereby breached their fiduciary duties. In the previous case, 3M moved to dismiss this claim for failure to plead it, and alternatively moved for summary judgment on the basis that the class had failed to present any evidence that the compensation was unreasonable. Although plaintiffs have included additional detail respecting this claim in this action, they conceded at oral argument that their current prohibited transaction claim is barred by collateral estoppel if the Court dismissed the previous claim on the merits. To avoid the application of this doctrine, plaintiffs argue that the Court in fact dismissed the previous claim for failure to plead. Plaintiffs' argument does not comport with the Court's decision, which clearly states that "3M is entitled to summary

judgment on the [on the prohibited transaction claim] because there is no evidence in the record to support the claim." *Harley*, 42 F. Supp. 2d at 910. In addition, the Court explicitly dismissed the claim with prejudice. *See id.* at 916. Accordingly, as plaintiffs agree that a previous dismissal on the merits mandates the dismissal of their current prohibited transaction claim, the Court will grant defendants' motion for summary judgment with respect to this claim.

ORDER

Based on the submissions of the parties the argument of counsel, and the entire file and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss or, in the alternative, for summary judgment [Docket No. 8] is GRANTED; and

2. Plaintiffs' complaint [Docket No. 1] is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 7, 2000
at Minnepapolis, Minnesota.

/s/ John R. Tunheim
JOHN R, TUNHEIM
Untied States District Judge